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No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

FAIR POLITICAL PRACTICES COMMISSION,
and
QUENTIN L. KOPP and ROSS JOHNSON,

*Petitioners,*

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO, *et al.*,
and
CALIFORNIA DEMOCRATIC PARTY,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Does Proposition 73's prohibition on the retention of over $12,000,000 in campaign contributions raised in unlimited amounts by incumbent politicians serve the compelling state interest of providing equal electoral opportunity for challengers and incumbents and avoiding the appearance of corruption by purging past potentially corrupting contributions from a system of limited contributions?

Is Proposition 73's scheme of political campaign contribution limitations, including a prohibition on the transfer of political "war chests" into successive political campaigns by incumbent candidates and the transfer of contributions to races or candidates for which the contributions were not intended, justified by the compelling state interest of assuring truth in campaign fund raising?

## LIST OF PARTIES

The petitioners herein are the authors and proponents of Proposition 73, California State Senator Quentin L. Kopp and State Assemblyman Ross Johnson.

Additional petitioner California Fair Political Practices Commission is the administrative agency charged with enforcement of the Political Reform Act of 1974, the body of California state law amended by Proposition 73.

Respondents named herein are Service Employees International Union, AFL-CIO, CLC; California State Council of Service Employees/COPE; the California State Teachers Association; the California Teachers Association for Better Citizenship Political Action Committee; the Committee to Protect the Political Rights of Minorities; California State Assembly Speaker Willie L. Brown; the Willie L. Brown Campaign Committee; the Friends of David Roberti; the Friends of John Burton; California State Assemblyman John Burton; Alice Huffman; Former State Assemblyman Michael Roos; and Allen Ruby.

Also named as a respondent herein is the California Democratic Party, intervenors in the proceedings below.

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**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

Petitioners Quentin L. Kopp and Ross Johnson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 7, 1992.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 955 F.2d 1312 (9th Cir. 1992).

The opinions of the United States District Court for the Eastern District of California are reported at 721 F.Supp. 1172 (E.D.Cal. 1989) (reprinted in the Appendix at App. 1), and 747 F.Supp. 580 (E.D.Cal. 1990).

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered on February 7, 1992. The jurisdiction of this Court is invoked under 28 USC §1254(1).

## CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The full text of Proposition 73 is set forth in the Appendix at App. 21. The relevant portions of the California Government Code enacted with the passage of Proposition 73 include the following:

> 85104. The provisions of this chapter shall become operative on January 1, 1989.
>
> Section 85202. (a) A candidate may only accept contributions from persons, political committees, broad based political committees, and political parties and only in the amounts specified in Article 3 (commencing with Section 85300). A candidate shall not accept contributions from any other source.
>
> (b) All contributions deposited into the campaign account shall be deemed to be held in trust for expenses associated with the election of the candidate for the specific office for which the candidate has stated, pursuant to Section 85200, that he or she intends to seek or expenses associated with holding that office.
>
> Section 85304. No candidate for elective office or committee controlled by that candidate or candidates for elective office shall transfer any contribution to any other candidate for elective

office. Transfers of funds between candidates or their controlled committees are prohibited.

Section 85306. Any person who possesses campaign funds on the effective date of this chapter may expend those funds for any lawful purpose other than to support or oppose a candidacy for elective office.

## STATEMENT OF THE CASE

This case involves the question of whether the First and Fourteenth Amendments to the United States Constitution are violated by Proposition 73, a statutory scheme regulating political campaign contributions in the State of California. As such, there is a federal question involved and the district court had jurisdiction pursuant to 28 USC §1331.

### I. Statement of Proceedings Below

Plaintiffs began this action in United States District Court by moving for a preliminary injunction to prohibit enforcement of Proposition 73's ban on the transfer of candidate funds from both the prior and current election year. The district court enjoined Section 85306, which prohibited the use of campaign funds raised prior to January 1, 1989 to support or oppose a candidacy for elected office. Additionally, the court also enjoined enforcement of Sections 85200, 85201, 85202, and 85304 "to the extent that these provisions prohibit transfers of funds between one candidate separate committees."

Plaintiffs moved on June 8, 1989 for a summary judgment, declaring California Government Code Section 85306 unconstitutional on the grounds that it violated the First and Fourteenth Amendments to the United States Constitution. The district court permanently restrained enforcement of Section 85306. *Service Employees International Union, et al. v. FPPC*, 721 F.Supp. 1172 (E.D. Cal. 1989). (Hereinafter *"SEIU I"*.)

The court rejected the argument that Section 85306 was an integral part of an overall contribution limitation scheme by noting that campaign expenditures by candidates have "discreet First Amendment characteristics," and that merging consideration of Section 85306 into Proposition 73's scheme of contribution limitations "contradicts both general First Amendment doctrine and the holding of *Buckley*." *SEIU I*, 721 F.Supp at 1177.

In anticipation of a special election scheduled for December 5, 1989 to fill a vacancy in the California State Senate, incumbent Legislator Lucy Killea declared a desire to transfer over $79,000 from her State Assembly campaign committee into her special election committee. The Fair Political Practices Commission (hereinafter "FPPC" or "Commission") on November 2, 1989 filed a motion in the district court to modify the terms of the preliminary injunction. The FPPC alleged that the injunction would possibly be used by candidates in upcoming races to evade Proposition 73's contribution limits for special elections.

Plaintiffs filed an application for an order to show cause and asked that the FPPC be held in contempt of the May 19, 1989 preliminary injunction for failing publicly to

advise all affected candidates that transfers may be made between a candidate's own committees, including special election committees.

The district judge issued a temporary restraining order on November 7, 1989 which:

> 1. Allowed the transfer of funds from the current campaign account to the special election account;
>
> 2. Provided that if such transfers were made, the amounts transferred to the special election account would not exceed the accumulative fiscal year limitation; and
>
> 3. Required that if any funds were transferred the officeholder keep accurate records of the monies transferred.

After a hearing, the court on December 4, 1989 modified its May 19, 1989 preliminary injunction to allow transfers from incumbent legislators non-special elections committees to special election committees during both the special election cycle and special election runoff cycle. The district court enjoined the operation of Proposition 73 so to allow incumbent legislators to utilize campaign contributions raised outside the special election cycle.

Trial in this matter was conducted over a six day period in late January and early February, 1990. Exactly six weeks before the date of the November 6, 1990 General Election, the district court issued its findings of fact and conclusions of law. *Service Employees International Union, et al. v. FPPC*, 747 F.Supp. 580 (E.D.Cal. 1990). (Hereinafter "*SEIU II.*") On September 25, 1990, the court found Proposition 73 unconstitutional because it operated

on a fiscal year, not per election, basis. Declaring "[h]ere, what is at stake is the ability of candidates to compete for contributions on an equal basis as a matter of fact," *SEIU II*, 747 F.Supp at 590, the district court held that Proposition 73, in its timing of contribution limitations on a fiscal year basis, was constitutionally infirm "because contributions translate into political speech, [and] the favoring of incumbents over challengers constitutes a significant impediment to fair access to the political process." *SEIU II*, 747 F.Supp at 590.

An appeal was filed on the same day the district court's decision invalidating Proposition 73 was announced. On the same day the district court denied the FPPC's request for immediate stay, Wednesday, September 26, 1990, Assemblyman Johnson and Senator Kopp applied to the United States Court of Appeals for the Ninth Circuit for an immediate stay of the lower court decision pending appeal. That motion was denied on September 27, 1990, but the Court of Appeals allowed renewal of the motion upon a denial of the stay motion before the district court.

On Friday, September 29, 1990, the district court denied the motion by the FPPC for a complete stay but stayed execution of its judgment as it related only to legislative races. On Saturday, September 30, 1990, Justice O'Connor denied the request of the petitioners Assemblyman Johnson and Senator Kopp for an immediate stay pending appeal.

The Court of Appeals entertained the motion of Assemblyman Johnson and Senator Kopp for an emergency motion for stay pending appeal on October 2, 1990, and denied the motion the following day.

A further application for stay by Assemblyman Johnson and Senator Kopp was denied by this Court on Friday, October 12, 1990, and this appeal ensued.

The Court of Appeals, by a 2-1 vote, upheld the decision of the district court. *Service Employees International Union, et al. v. FPPC*, 955 F.2d 1312 (9th Cir. 1992). On February 7, 1992, the Court of Appeals rejected challenges to the justiciability of the controversy, and held that appellants had failed to show how Proposition 73's contribution limitations had served the compelling governmental interest of preventing corruption or the appearance of corruption. 955 F.2d at 1321. After upholding the district court's conclusion that Proposition 73's fiscal year contribution limitations discriminated against challengers, the Court of Appeals then rejected the arguments of these petitioners that Proposition 73's ban on pre-1989 campaign contributions served the important purpose of purging past unlimited funds from the new system enacted by Proposition 73. 955 F.2d at 1323.

Petitioners join in the petition for certiorari filed by petitioner Fair Political Practices Commission. Petitioners Kopp and Johnson file this petition separately, however, to raise the issue of whether incumbent politicians have a protected right to carry forward into their political campaigns unlimited campaign contributions raised under a prior unregulated system. Further, petitioners here also address Proposition 73's prohibition on inter and intra candidate transfer of campaign contributions.

## II. The Operation of Proposition 73

Proposition 73 was drafted as an integrated and interrelated system of political campaign finance regulation. The initiative added a new Chapter 5 (commencing with Section 85100) to the Political Reform Act of 1974 (Title 9 (commencing with Section 81000)), and generally utilized the definitions of that Act.[1]

Proposition 73 applies to all candidates for elective office in California and is subject to lower contribution limitations imposed by a local governmental agency. Section 85101.

Proposition 73 requires individuals who intend to be candidates for elective office, prior to the solicitation or receipt of any contribution or loan, to file with the Fair Political Practices Commission a statement, signed under penalty of perjury, of the intent to be a candidate for a specific office. Section 85200. Once this statement of intent is filed, a candidate is required to: (1) establish one campaign contribution account at an office of a financial institution located in the state; (2) file the name of the financial institution, the specific location, and the account number, with the Commission within 24 hours; (3) deposit all contributions and loans made to the candidate or his or her controlled committee into this account; (4) deposit any personal funds which will be utilized to promote the candidate's election into this account; and (5)

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[1] Unless otherwise noted, all statutory references are to the California Government Code.

make all campaign expenditures from this account. Section 85201.

Proposition 73 provides that a candidate may only accept contributions from a person (defined in Section 85102(b)), a political committee (defined in Section 85102(c)), a broad based political committee (defined in Section 85102(d)), or a political party, and only in specified amounts during specified periods of time based on a fiscal year. Section 85202(a) (current version at Section 89510(a)). All contributions deposited into the campaign account specified in Section 85201 are deemed to be held in trust for expenses associated with the election of the candidate to the specific office which the candidate has stated an intention to seek or for expenses associated with holding that office. Section 85202(b) (current version at Section 89510(b)).

Proposition 73 prohibits the expenditure by a public officer, or the acceptance by a candidate, of any public moneys as defined in Section 426 of the California Penal Code. Section 85300 and Section 85102(e).

Proposition 73 prohibits the making or receipt by a candidate or the candidate's controlled committee of contributions in any fiscal year (defined in Section 85102(a)) in excess of the following amounts:

> With respect to persons, except a candidate's contribution of his or her personal funds, any contribution of loan which would cause the total amount contributed or loaned by that person to exceed $1,000 (Section 85301(a)).
>
> With respect to political committees, any contribution or loan which would cause the total

amount contributed or loaned by that political committee to exceed $2,500 (Section 85303(a)).

With respect to broad based political committees and political parties any contribution or loan which would cause the total amount contributed or loaned by that broad based political committee or political party to exceed $5,000 (Section 85303(b)).

Moreover, persons are prohibited from making any contribution or loan, and political committees, broad based political committees, and political parties are prohibited from accepting any contribution or loan from a person, which would cause the total amount contributed or loaned by that person for the purpose of making contributions to candidates for elective office to exceed $2,500 in any fiscal year. Section 85302.

There are also specific provisions with respect to special elections and special runoff elections which impose the same contribution limits but substitute "special election cycle" (defined in Section 85305(b)(1)) and "special runoff election cycle" (defined in Section 85305(b)(2)) for the term "fiscal year."

Proposition 73 prohibits candidates for elective office or their controlled committees from transferring any contribution to any other candidate for elective office and prohibits the transfer of funds between candidates and their controlled committees. Section 85304.

Proposition 73 provides that any person who possesses campaign funds on the effective date of the provisions relating to campaign financing (January 1, 1989

(Section 85104)) may expend these funds for any lawful purpose other than to support or oppose a candidacy for elective office. Section 85306.

Proposition 73 states that its provisions regarding loans shall apply to extensions of credit, but excludes loans which are made to the candidate by a commercial lending institution in the lender's regular course of business on terms available to members of the general public for which the candidate is personally liable. Section 85307.

Proposition 73 prohibits elected officeholders from accepting any gift or honorarium for any speech, article, or published work on a subject relating to the governmental process from any single source which is in excess of $1,000 in any calendar year, exclusive of actual travel expenses and reasonable subsistence. Section 85400 (current versions at Sections 89502 and 89506).

Finally, Proposition 73 amends certain provisions of the Act relative to newsletters and mass mailings to revise the definition of mass mailings to include "substantially similar" pieces of mail and to exclude responses to unsolicited requests, letters, or other inquiries (Section 82041.5) and to prohibit the sending of newsletters or mass mailings at public expense. Section 89001.

## REASONS FOR GRANTING THE PETITION

### I. The Court of Appeals' Decision Prohibits the State from Banning Incumbent Political War Chests and is Not Justified by the Compelling Interests Articulated in *Buckley v. Valeo* and Its Progeny.

In the jurisprudence considering constitutional challenges to campaign financing schemes, this Court has consistently found that certain fundamental rights implicated by such regulation must ultimately yield to the interests of the People in order to protect the integrity of their electoral process.

Petitioners, as elected state officials in their own right, are acutely cognizant of the constitutional freedoms that the respondents assert as the foundation of their attack on Proposition 73. While, however, the right of association is a "basic constitutional freedom," [*Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)], "[I]t is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' " *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), *quoting CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973).

In *Buckley v. Valeo*, this Court specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957).

Leading the charge against this popularly enacted reform are those most directly affected by the passage of Proposition 73, namely, California's most powerful incumbent politicians. They claimed that when the People of California enacted Proposition 73 on June 7, 1988, the public placed their *imprimatur* on an enactment which, both on its face and as applied, could not withstand scrutiny under the United States Constitution.[2]

Without so much as presentation of Proposition 73's actual effect on challengers,[3] or even a genuine challenger asserting a "personal stake" in the outcome of the litigation,[4] the courts below have struck down California's effort to take back its electoral campaigns. Even with this

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[2] Proposition 73 was enacted on June 7, 1988. Ironically, the same electorate held by the courts below to have enacted campaign finance reform which invidiously discriminated against challengers, passed Proposition 140 over two years later, an *initiative* which limited the terms of incumbent elected officials. *See Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991).

[3] The Court of Appeals acknowledged that it had before it no actual operation data indicating Proposition 73's actual operation. Instead, the court noted, "Experts may make reasonable projections of *future* harm based on reliable data collected under similar circumstances and they need not wait to measure the actual discriminatory effects of a law for their testimony to have probative value." 955 F.2d at 1318. (Emphasis supplied.)

[4] The Court of Appeals conceded that there was no aggrieved challenger to assert a justiciable cause of action before the district court. The Court of Appeals circumvented the issue of standing by granting the incumbent elected politicians standing to "assert their own associational rights and to challenge the fiscal year contribution limits as discriminatory." 955 F.2d at 1316.

Court's admonition that "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions," *Buckley*, 424 U.S. at 31, there was never a moment of hesitation by the federal courts below to dismantle Proposition 73.[5]

The Court of Appeals below saved the issue of Proposition 73's pre-effective date campaign funds until after it had affirmed the district court's holding that Proposition 73's contribution limitations discriminated against challengers. 955 F.2d at 1323.

The Ninth Circuit held that the purpose advanced by petitioners – to purge previously unregulated contributions from a regulated system under Proposition 73 – was no longer served by Proposition 73 because the limits themselves discriminated against challengers. 955 F.2d at 1323. The irony of such holding is that the very class of candidates deemed discriminated by Proposition 73,

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[5] Proposition 73 differs from the federal system in these significant respects:

1. Unlike Proposition 73, federal law prohibits contributions from labor unions, corporate contributions, and contributions to candidates for federal office from a federally chartered bank. 2 USC §441b.

2. Proposition 73 expressly prohibits mass mailings. Section 89001.

3. Federal law allows the retention of campaign contributions for the next election cycle, a practice prohibited by Proposition 73. Section 85304.

namely, challengers, is left financially disadvantaged by over $12,000,000 as a result of the Court of Appeals' application of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a case which recognized the legitimate interest in "eliminating from the political process the corrosive effect of political "war chests . . . " *Austin*, 494 U.S. at 666.[6]

In striking down the initiative, the courts below refused to apply the existing constitutional paradigm. Instead, the Ninth Circuit has sanctioned a model which differs significantly from that previously employed by this Court, and the end result is that California is left with no enforcement mechanism to prohibit the assembling of massive incumbent "war chests" and no limits on campaign contributions.

### A. Proposition 73's Carry Forward Ban is Not an "Expenditure Limitation" Under *Buckley*.

One of the central reforms of Proposition 73 was that contributors, in making a contribution to the candidate of their choice, would be guaranteed that the contribution would be used specifically for the office the beneficiary of their contributions sought. In prohibiting funds raised prior to Proposition 73 from being retained, the statutory scheme assured the People of California that all campaign

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[6] Although *Austin* involved a prohibition by the State of Michigan on corporate independent expenditures, the Court of Appeals noted that *Austin* was most relevant for its discrimination analysis of Proposition 73's contribution limitations for political candidates. 955 F.2d at 1320.

funds raised after January 1, 1989 would be raised within Proposition 73's mandate.

The Federal Election Campaign Act's (hereinafter "FECA") expenditure limitations challenged in *Buckley* were limited to three distinct types of expenditures. First, FECA imposed a ceiling on the total dollar amount a candidate could spend.[7] Second, FECA imposed a limit on independent expenditures, or those expenditures made by an individual or group without any coordination with the candidate.[8] Third, FECA limited a candidate's expenditure of personal funds.[9]

The expenditure limitations of FECA scrutinized by this Court in *Buckley* are different from that of Section 85306 in at least three significant respects:

1. FECA established a ceiling on total allowable spending by candidates on their campaigns. Section 85306 prohibits only the use of a

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[7] Presidential candidates were permitted to spend $10,000,000 in the primary election and $20,000,000 in the general election. The ceiling for Senate campaigns was the greater of 8 cents multiplied by the voting population or $100,000 in the primary and the greater of 12 cents per voter or $150,000 in the general election. House races were limited to $70,000 in both primary and general election campaigns. *Buckley*, 424 U.S. at 54-55.

[8] The independent expenditure limitations at issue restricted independent expenditures by "persons" on behalf of clearly identified candidates to $1,000. *Buckley*, 424 U.S. at 39-40.

[9] The ceilings on personal funds varied from $50,000 for Presidential or Vice Presidential candidates to $35,000 for Senatorial candidates to $25,000 for most candidates for the House of Representatives. *Buckley*, 424 U.S. at 51.

> discreet body of campaign funds. It places no limitations at all upon the expenditure of funds lawfully collected under the contribution limits of Proposition 73.
>
> 2. The expenditure limits established in FECA applied to independent expenditures and to candidates' expenditures of personal funds. Section 85306 applies only to the expenditure of *campaign* funds.
>
> 3. The expenditure limitations of FECA were a permanent element of the Act. They applied to all campaign funds collected under FECA. Section 85306, on the other hand, was designed to affect only the transition between the Political Reform Act and the version amended by Proposition 73.

The expenditure limitations of FECA were thus direct and quantitative limits upon the amount that candidates could spend to promote their candidacies. Section 85306 has no such express quantitative limitation. The restriction on the use of pre-1989 campaign funds contained in Section 85306 places no "direct quantity restrictions on political communication and association. . . . " *Buckley*, 424 U.S. at 18.

Further, the expenditure limitations in *Buckley* were continuing limitations that applied to all expenditures, regardless of when or how that the money that was expended had been raised. Section 85306, in contrast, places limitations only upon the expenditure of certain funds that were not raised in compliance with Proposition 73. Whereas the expenditure limitations of FECA were a central aspect of that legislation, Section 85306 is an enforcement provision intended only to address the

transition between the unregulated making of contributions prior to Proposition 73 and the regulated contribution structure established by the voters with their approval of the initiative on June 7, 1988.

By articulating Proposition 73's pre-1989 carry over ban as an "expenditure limitation," the courts below have ingenuously invoked *Buckley* as a sword to strike Proposition 73 when the decision should have been a shield to protect the initiative's reforms from respondents' attack.

### B. Section 85306 Serves the Compelling State Interest of Purging Previously Unregulated Contributions From a Regulated System Under Proposition 73.

Proposition 73 is a comprehensive statutory scheme of reform. One of the operative methodologies faced by the drafters of the initiative was providing a means for disposition of campaign funds raised prior to Proposition 73's effective date of January 1, 1989. Prior to Proposition 73, incumbent officeholders were allowed to retain campaign funds for the subsequent election cycle. In order fully to implement the contribution, trust and transfer provisions of Proposition 73, Section 85306 provided that persons who possessed funds on its operative date could expend those funds "for any lawful purpose other than to support or oppose a candidacy for elective office."

This Court recognized in *Buckley* that the State has a legitimate and compelling interest in protecting the electoral process from corruption and the appearance of corruption. In upholding FECA's limitation upon campaign contributions the Court said:

> These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic government interest in safeguarding the integrity of the electoral process . . . .

*Buckley*, 424 U.S. at 58.

The courts below rejected the argument that Section 85306 was designed to prevent the appearance of corruption. In rejecting the appearance of corruption rationale, the courts below failed to view Section 85306 as an integral part of an overall scheme of campaign financing regulation. In the case of California's pre-1989 campaign funds, there was no guarantee that campaign contributions garnered in unlimited amounts – contributions lending themselves to the appearance of corruption – would be purged from the system.

Further, the reforms of Proposition 73 needed to begin on a date certain, January 1, 1989. Section 85306 assured the public that Proposition 73's contribution limitation system would be free of corruption or the appearance of corruption by providing that all the candidates will have raised their campaign funds without being subject to the corrupting influence of large single-source contributions.

### C. Section 85306 is Narrowly Written to Allow Political Speech while Protecting the Integrity of California's Campaign Finance Reform.

Section 85306 allowed incumbent politicians to expend their pre-1989 campaign funds "for any lawful

purpose" except, for example, transfer to their new campaign account or to other candidates. While the courts below held that Proposition 73's carry forward prohibition was not narrowly written, the lawful purposes exception envisioned by Section 85306 indicates that the speech interests asserted by the incumbent respondents were carefully considered by the initiative.

The "narrowly tailored" standard was recently discussed by this Court in *Board of Trustees of SUNY v. Fox*, 492 U.S. 469 (1989). The Court noted:

> In requiring that to be "narrowly tailored" to serve an important or substantial state interest, [citations omitted] we have not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). And we have been loath to second-guess the Government's judgment to that effect.

*SUNY*, 492 U.S. at 478.

Assuming that the People of California can legitimately enact campaign finance reform, the "conceivable alternatives" for uses of pre-1989 funds included such purposes as paying past campaign debt and donating to ballot measure committees.[10] If the compelling interests

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[10] The district court found that the "lawful purposes" for which pre-1989 funds could be expended was extremely broad. The court noted that such funds could be expended

(Continued on following page)

asserted above for prohibiting incumbents from carrying forward their pre-Proposition 73 funds passes muster, then the lawful purposes exception of Section 85300 affords free speech protection consistent with the Constitution.[11]

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to among other things, "to support or oppose ballot measures or candidates for federal office, to pay pre-1989 campaign expenses, to disseminate political views as long as unconnected with a campaign for state elective office or, for that matter, to contribute to charity." *SEIU I*, 721 F. Supp. at 1176.

[11] Ignored by the Court of Appeals was the district court's complete rejection of the arguments raised by petitioners here that by operation of Section 85306, challengers would be assured of an equal opportunity to participate in the political marketplace:

> Finally, defendant-intervenors argued that Section 85306 served the compelling state interest of providing equal opportunities to challengers and incumbents. This argument may hear under the aegis of the equal protection clause, in effect merely recharacterizes the "level playing field" argument rejected in *Buckley* [424 U.S. at 48-49]. In light of *Buckley*, the defendants' argument cannot be entertained.

*SEIU I*, 721 F.Supp. at 1179. Thus, the district court found no state interest whatsoever in providing an equal footing for both challengers and incumbents within Proposition 73's carry over provisions. When considered with court's later findings of fact and conclusions of law after trial on the merits (and upheld by the Court of Appeals), this was a curious rejection of a premise it would later wholeheartedly adopt to invalidate Proposition 73 completely.

## II. Proposition 73's Trust and Transfer Provisions Assure Truth in Campaign Fund Raising, A State Interest Rejected by the Courts Below.

The aim behind Proposition 73's transfer ban, trust, and statement of intent provisions, in addition to the fiscal year fund raising cycle, was to provide California with truth in campaign fund raising. Proposition 73, in practical terms, required candidates to inform their contributors of the office to which they sought election, to hold their contributions in trust for only the expenses related to running for that office, and to refrain from transferring contributions received by that candidate to another candidate or to engage in fund raising to simply build up a campaign "war chest."

The Court of Appeals employed the "expenditure limitation" analysis of *Buckley* in order to void Proposition 73's truth in campaign fund raising.[12] The Court of Appeals refused to validate the asserted interest in assuring campaign contributors that funds contributed would not be raised for one office and spent for another. 955 F.2d at 1323. Further, the practice of political power brokering could continue in California because "the inter-candidate transfer ban prohibits small contributions as

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[12] In *Buckley*, this Court struck down a provision placing absolute amount which could be spent by federal candidates, noting that "A restriction on the amount of money a person can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19.

well as large contributions," and thus fails under *Buckley*. 955 F.2d at 1323.

Proposition 73's restrictions on candidate funds were passed because California's recent political history is replete with state races where last minute transfers of thousands of dollars from political power brokers have made the difference in electoral outcomes. Further, potential challengers for office have been effectively excluded from the political marketplace because incumbent officeholders have had the ability to transfer thousands of dollars from their current campaign accounts to a committee formed for the intended political office.[13]

The State of California has a compelling interest in limiting the actuality or appearance of corruption, *Buckley*, 424 U.S. at 26. Yet there is also a compelling interest in maintaining a stable political system. *Eu v. San Francisco Democratic Committee*, 489 U.S. 214, 226 (1989). Proposition 73's transfer ban serves the compelling state interest of maintaining electoral stability while providing consumer protection and promoting challenger participation in the political market place.

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[13] Petitioner Ross Johnson testified at trial that in 1986 then-Assemblyman Gray Davis was able to transfer approximately $1,000,000 from his Assembly Committee into a committee for State Controller, thus effectively preempting the field of possible candidates. Reporters Transcript at 1016:21-25, 1017:1-8.

Petitioner Quentin Kopp testified from personal experience how the ability of a candidate to "office shop" effectively precluded his 1982 bid for the Board of Equalization. Reporters Transcript at 912:7 *et seq.*

But the Court of Appeals has applied *Buckley* completely to prohibit future efforts at restricting campaign finances. Read correctly, *Buckley* prohibits an absolute dollar restriction spent by candidates which "would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling." *Buckley*, 424 U.S. at 20. Proposition 73, by contrast, places no ceiling on the *total* amount of dollars which can be raised and spent in the campaigns for the specific offices which the candidate has declared.

In the context of special elections, the efficacy of Proposition 73's trust provisions and intra candidate transfer prohibitions becomes more acute. A special election which occurs as a result of a death in office or resignation ensures that all candidates who are potential candidates have the opportunity to raise funds for that special election if they choose to be a candidate.[14]

Finally, the Court of Appeals applied *Buckley* to reject these additional legitimate rationales for Proposition 73's transfer bans: 1) Transfers of contributions between candidates possess the potential of obscuring the original source of the contribution; 2) Large last minute transfers of substantial sums of money to candidates creates a "bunker" mentality among candidates that sufficient

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[14] Proposition 73's contribution limits are still being enforced by the Fair Political Practices Commission for special elections. As a result of the holdings below, however, incumbent officeholders currently can transfer funds in the limitation amounts from their incumbent "war chests" to their special election committees.

transfers might be directed against them, thereby motivating such candidates to raise sums of money that they might not otherwise believe is necessary for their re-election campaign; and 3) Transfers of contributions to a single candidate in a multi-party candidate primary field bestows a dramatic advantage upon that candidate.

## CONCLUSION

Proposition 73 was an effort to extinguish the financial gerrymander enjoyed by incumbent politicians in California. Because of the misapplication of *Buckley* and subsequent jurisprudence, California is left with the system deemed corrupt prior to the enactment of Proposition 73.

For the above reasons, this petition for certiorari should be granted.

Dated: May 7, 1992

Respectfully submitted,

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**SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC; et al., Plaintiffs,**

**California Democratic Party, an unincorporated association, Plaintiff in Intervention,**

**v.**

**FAIR POLITICAL PRACTICES COMMISSION, et al., Defendants,**

**Quentin L. Kopp and Ross Johnson, Defendants in Intervention.**

**No. CIV. S-89-433 LKK.**

United States District Court, E.D. California.

Sept. 14, 1989.

Action was brought challenging constitutionality of California statutes seeking to control campaign financing for state offices. Plaintiffs moved for summary judgment on statute that prohibited use of carryover campaign funds in future campaigns for state office. The District Court, Karlton, Chief Judge, held that law prohibiting candidates from expending carryover funds in campaigns for elective office violated First Amendment, where statute did not in fact address problems of political corruption or appearance of corruption and was overbroad.

Motion for partial summary judgment granted; permanent injunction issued.

Joseph Remcho, Kathleen J. Purcell, Lowell Finley, Julie M. Randolph, Steven D. Dopkin, Remcho, Johansen & Purcell, San Francisco, Cal., for plaintiffs.

Robert E. Darby, Calvin House, Fulbright, Jaworski, Reavis & McGrath, Los Angeles, Cal., for plaintiff in intervention.

Kathryn E. Donovan, Scott Hallabrin, Fair Political Practices Com'n, Sacramento, Cal., for defendants.

Quentin L. Kopp, Kopp & DiFranco, San Francisco, Cal., for defendants in intervention.

ORDER

KARLTON, Chief Judge.

In this action, plaintiffs brought suit against the California Fair Political Practices Commission ("FPPC")[1] challenging as unconstitutional a statute adopted pursuant to California's initiative process, Proposition 73, codified as Title 9, Chapter 5 of the California Government Code.[2] Proposition 73 seeks to control campaign financing in various ways. The motion at bar seeks summary judgment only with regard to California Government Code

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[1] Under state law, the FPPC is the agency charged with the responsibility of enforcing civil statutes pertaining to the financing of elections. Cal.Gov.Code § 83111.

[2] Subsequently, I granted the motions of State Senator Kopp and Assemblyman Johnson, self-described principal authors of Proposition 73, to intervene as parties defendant, and the California Democratic Party to intervene as a plaintiff.

section 85306,[3] which concerns the use of campaign funds raised prior to January 1989.[4]

Plaintiffs filed their complaint for declaratory and injunctive relief on March 24, 1989. A motion for preliminary injunction was granted on May 15, 1989. That order enjoined the FPPC from applying section 85306 to pre-1989 funds raised within Proposition 73's overall contribution limits[5]. At a subsequent status conference at which a hearing on the instant motion was set, the parties stipulated that in the event this motion is granted, pre-1989 funds could be disbursed and accepted without regard to fiscal year deadlines.

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[3] The statute provides: "Any person who possesses campaign funds on the effective date of this chapter may expend those funds for any lawful purpose other than to support or oppose a candidacy for elective office."

[4] Defendants in intervention have filed a motion to strike certain evidence. The motion is denied since it was not filed in conformance with the briefing schedule established for the motion at bar. *See* Local Rule 110. In any event, extended consideration of the motion is unnecessary since none of the evidence defendant-intervenors seek to strike is crucial to the court's analysis.

[5] As a general matter, Proposition 73 limits fiscal year contributions to candidates as follows: $1,000 per individual (§ 85301(a)); $2,500 per political committee (§ 85303(a)); and $5,000 per political party, or broad-based political committee (§ 85303(b)).

## I

## SUMMARY JUDGMENT STANDARDS UNDER FED.R.CIV.P. 56

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

If the moving party identifies an absence of material fact in the record, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-1356, 89 L.Ed.2d 538 (1986). In attempting to establish the existence of this factual dispute, the opposing party is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n. 11, 106 S.Ct. at 1355 n. 11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505,

2510, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence could support a verdict for the nonmoving party, *Anderson*, 477 U.S. at 248-49, 106 S.Ct. at 2510-11; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir.1987).

In resolving the summary judgment motion, the court examines the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513-2514, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam)); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir.1979).

Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir.1987). To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356 (citation omitted).

## II

## FACTS

Plaintiffs, relying upon the FPPC's records, note that incumbent state legislators and constitutional officers had $12,403,312 in campaign funds on hand as of December 31, 1988. Defendant-intervenors, while supplying no contradictory evidence, assert that:

> Defendant-Intervenors believe that the amount of campaign funds affected by section 85306 is a genuine issue of material fact. Reference Declarations of Ross Johnson and Quentin L. Kopp and Supplemental Declaration of Ross Johnson declaring that Section 85306 does not restrict his First Amendment rights of free speech.

Amended Response by Defendant-Intervenors to Plaintiff's Statement of Undisputed Facts, filed July 28, 1989, at 2.

These referenced declarations do not contradict the facts asserted by plaintiffs, nor is there a challenge to the reliability of the relevant records. Rather, in their Amended Response, defendant-intervenors dispute that funds are not available "for campaign purposes" (at best a legal issue, at worst a semantic dispute); the effect of section 85306 on individual plaintiffs (e.g., "the precise affects [sic] of section 85306 on the financing of the Friends of David Roberti is a genuine issue of material fact"), and like matters which do not appear to this court to constitute *material* issues of fact. *See* Section I (material issue of fact is one which affects the disposition of the motion).

Thus the Declaration of Ross Johnson, to which the objection refers, avers:

> I have been able to meet with my constituency and conduct the duties of my leadership position without any inhibition whatsoever on my ability to communicate my political views and agenda.
>
> The statutory structure which is alleged to "impermissibly restrict[ ]" Plaintiffs' (and the rest of us privileged enough to represent our constituients [sic]) constitutional freedoms does not do so. In drafting Proposition 73, it was my goal to ensure California's elected officials would not sacrifice their guarantees under the First and Fourteenth Amendments. I believe I met that goal, and on June 7, 1988 the People of California agreed.

Johnson Declaration at 5. This declaration simply does not create any issue of material fact. Assemblyman Johnson's subjective judgment concerning the effect of section 85306 on his ability to communicate with his constituents, and his intentions concerning the effect of Proposition 73, do not raise disputes as to its objective effect on the ability of either himself or others to expend the carryover funds on behalf of their own political campaigns. As I shall explain below, the central relevant fact at bar is that by virtue of the provisions of section 85306, a large sum of money raised prior to the effective date of the statute may not be expended on behalf of a candidate's pursuit of state elective office. This fact is not in genuine dispute.

## III

## POLITICAL CAMPAIGNS AND THE FIRST AMENDMENT

By its plain terms, section 85306 permits the use of campaign funds raised prior to the effective date of the statute for any lawful purpose except that for which it was given; namely, the direct advancement of the donee's political career. *See* footnote 3. Plaintiffs contend that the statute, in precluding expenditure of carryover funds to support or oppose a candidacy for state elective office, violates the free speech provisions of the First Amendment of the United States Constitution which, of course, were made applicable to the states through the Fourteenth Amendment. *See, e.g., Fiske v. Kansas,* 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927).

To sustain their attack, plaintiffs must first demonstrate that the provisions in issue impinge upon rights protected by the First Amendment. This task is easily accomplished. In *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court taught that the expenditure of funds in connection with a political campaign is a matter of particular First Amendment concern. Critical to the issue at bar was the Court's determination that, in essence, every dollar spent in a campaign has value as protected speech and, accordingly, every restriction on expenditures implicates First Amendment rights. The Court explained:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their

> exploration, and the size of the audience reached. This is because virtually every means of communication ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

424 U.S. at 19, 96 S.Ct. at 634-635. *See also California Medical Ass'n v. Federal Election Commission*, 641 F.2d 619, 627 (9th Cir.1980), *aff'd* 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) ("the ideal of the First Amendment, certainly in respect to political expression, is to permit the maximum 'quality of political speech,' as determined by the speaker"). Defendants seem to argue that given the broad discretion to expend carryover funds provided by the statute, it should not be regarded as an expenditure limitation at all and, accordingly, should not be perceived as implicating First Amendment rights. The argument must be rejected.

All parties apparently agree that the definition of "lawful purposes" for which pre-1989 funds could be expended is extremely broad. Such funds can be expended, among other things, to support or oppose ballot measures or candidates for federal office, to pay pre-1989 campaign expenses, to disseminate political views as long as unconnected with a campaign for state

elective office or for that matter, to contribute to charity.[6] Upon careful consideration, however, the broad scope of available targets for expenditure is irrelevant to the threshold First Amendment issue.

Defendants' argument amounts to no more than an attempt to deny that restrictions on political expenditures are restrictions on political speech. This attempted reliance on semantic legerdemain will not lie. It is, of course, true that many lawful expenditures might indirectly aid a candidate's campaign; that is simply beside the point. The statute constitutes a direct restraint on the content of the candidate's speech. It permits speech on behalf of a measure to undo Proposition 73, but not in support of the candidate's election. The argument that there is no restriction on speech because the candidate can support his campaign with other funds also misses the mark. It is the essence of *Buckley* that each dollar has First Amendment value. That the expenditure limitation directly implicates the core values of the First Amendment seems beyond dispute. *California Medical Ass'n v. FEC, supra.*

Having concluded that the right of candidates to expend carryover funds in campaigns for elective office is "entitled to full First Amendment protection, we now look to see if there is a sufficiently strong governmental

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[6] "Any lawful purpose," as defined by Cal.Admin.Code tit. 2, § 18536.2(a), is circumscribed by the "personal use" laws of California Elections Code § 12401. These laws forbid the use of funds for "a substantial personal benefit" which "does not have more than a negligible political, legislative, or governmental purpose."

interest served by [the statute's] restriction on them and whether the section is narrowly tailored to the evil which may be legitimately regulated." *FEC v. National Conservative PAC*, 470 U.S. 480, 496, 105 S.Ct. 1459, 1468, 84 L.Ed.2d 455 (1985), (hereinafter "*PAC*").

The first step, identification of a strong governmental interest, presents a serious impediment to the proponents of section 85306. The gist of their argument is that Proposition 73 was passed as an overall attempt at campaign reform, and that section 85306 compliments the provisions concerning contribution limits which reflect the proposition's central purpose. Put another way, the defendants contend that the governmental interest which section 85306 seeks to address is to "level the playing field" on which candidates enter campaigns under Proposition 73's contribution limits. Defendant-intervenors cannot successfully maintain this argument. In *Buckley*, the Court specifically rejected it:

> It is argued . . . that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [the] expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for

> the bringing about of political and social changes desired by the people.' "

424 U.S. at 48-49, 96 S.Ct. at 649 (citations omitted).

Defendants seek to avoid the plain consequences of *Buckley* by equating the interests sought to be served by section 85306 with the interest served by contribution limits. They argue that section 85306 cannot be viewed in isolation, but that the court must examine the statute's purpose as a whole. Defendants seem to suggest that since the contribution limits provisions address the evil of corruption or the appearance of corruption engendered by large contributions, and since in some manner section 85306 effectuates these limitations, it likewise serves to limit corruption or the appearance thereof.

Defendants' argument is unpersuasive; it obscures both the nature of the speech addressed by the statute in issue and the character of the regulation of that speech imposed by the statute. In sum, the defendants ask the court to apply an ax where only a scalpel will do. As the Supreme Court has frequently admonished, " 'precision of regulation must be the touchstone' in the First Amendment context." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n. 11, 106 S.Ct. 1066, 1074 n. 11, 89 L.Ed.2d 232 (1986), *quoting NAACP v. Button*, 371 U.S. 451, 438, 83 S.Ct. 328, 340-341, 9 L.Ed.2d 405 (1963). *Buckley* taught that a close examination of both the particular speech regulated and the manner of regulation is required; it held on the basis of such an examination that a candidate's expenditure has a different character than a contributor's act of donating and, applying an identical "strick scrutiny" test to expenditures and contributions,

concluded that different results obtained.[7] As with the expenditure limitations at issue in *Buckley*, section 85306 directly affects a candidate's "quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19, 96 S.Ct. at 634. Money which, but for the band, could be used on pamphlets and advertising, for example, cannot be so used, and dissemination of the political message is accordingly curtailed.

In short, section 85306 bans the expenditure of money directly on a campaign. Campaign expenditure by the candidate has discrete First Amendment characteristics. *California Medical Ass'n*, 641 F.2d at 627 (spending is entitled to the maximum protection when the speaker and the spender are one and the same). Ignoring those characteristics by failing to discretely analyze section 85306, and instead merging its consideration into an analysis of the general purpose of Proposition 73, contradicts both general First Amendment doctrine and the holding of *Buckley*. Section 85306 regulates a different form of speech than the contribution limits and must be analyzed

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[7] *Buckley* effectively found that a contribution limitation scheme could pass constitutional muster because limiting the amount of a contribution does not infringe on the "speech" interest inherent in giving. The contribution limitations of Proposition 73 are not now before the court. Nonetheless, defendants do not contend that Proposition 73's contribution limitations provide any greater justification for an expenditure limitation than the contribution limitations considered in *Buckley* provided the expenditure limitation considered and rejected there.

separately. To justify the prohibition of expenditures commanded by section 85306, the defendants must demonstrate a "compelling state interest" justifying that section, as distinct from the interest potentially justifying contribution limits.

I will assume *arguendo* that section 85306 seeks to address the problem of political corruption or the appearance of corruption.[8] The question then is whether section 85306 in fact addresses those evils and, if so, whether it is narrowly tailored to that purpose. To answer those questions it is crucial to define those evils.

The High Court has explained that "corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaign." *PAC*, 470 U.S. at 497, 105 S.Ct. at 1468. Given this definition, it appears that the ban on expenditure of carryover funds does not address the issue of corruption at all. Under the teaching of *PAC*, the corrupting influence of large contributions results from their receipt and the hope of future receipts. "The hallmark of corruption is the financial quid pro quo: dollars

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[8] Although other arguments in favor of Proposition 73 were offered to voters, the anti-corruption in fact and appearance rationale is the only one sanctioned by the Supreme Court, *PAC*, 470 U.S. at 496-97, 105 S.Ct. at 1468-69, and the only one advanced by the FPPC. Defendant-intervenors argue that preserving the integrity of the electoral process is a separately sanctioned rationale, citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89, 98 S.Ct. 1407, 1422, 55 L.Ed.2d 707 (1978). This appears to be yet another semantic distinction without a difference in substance.

for financial favors." *Id.* Yet a ban on only certain expenditures does not address the obligation arising from receipt; a debt owed is a debt owed, no matter the purpose for which the money may be spent. There is simply no link between the elimination of corruption and the ban on expenditures of money already received.

Moreover, to the extent that the "lawful purpose" regulations (see footnote 6) allow funds to be used indirectly for campaigning, the carryover ban again fails to address the problem of corruption as defined by the High Court. Under the regulations, funds may be used to pay off past campaign debts, for example, or to sponsor a ballot initiative related to a candidate's platform. If the obligations engendered by receipt and expenditure of large contributions is thought to be the evil to be controlled, no principled distinction can be drawn between direct and indirect expenditures. For the very same reason, section 85306 is not narrowly tailored to restrict the evil to be controlled.

Other reasons convince this court that section 85306 is overbroad. The statute overshoots its mark by banning expenditures of all money on hand, whether it was obtained in large or small amounts. If the essence of corruption is the quid pro quo, the amount tendered must be sufficient to give rise to an obligation. Here, the statute prohibits the expenditure of sums received by the candidate which were small enough so that they neither could corrupt or even give the appearance of corruption. If, as Proposition 73 determines, individual contributions up to one thousand dollars do not pose a threat of corruption or the appearance of corruption, *see* footnote 3, then section 85306, which forbids the expenditure of funds on

hand no matter how small the individual contributions making up that amount were, is not narrowly tailored to address the evil which may be regulated.

Defendant FPPC asks the court to avoid the latter conclusion by accepting its regulations limiting section 85306 to contributions exceeding Proposition 73's guidelines. These regulations do not cure the infirmity created by the "lawful purposes" clause considered above. Moreover, I do not believe I would be free to do so in any event. A state court of general trial jurisdiction has invalidated these regulations as beyond the FPPC's powers. *California Common Cause v. Fair Political Practices Commission,* Los Angeles County Superior Court No. C709383. That determination appears inevitable under state law. Under California law, "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void." *Morris v. Williams,* 67 Cal.2d 733, 63 Cal.Rptr. 689, 433 P2d 697 (1967). Section 85306 clearly bans all carryover funds, and the attempt to limit this effect would appear to be an usurpation of the legislative function. The FPPC's contention is premised on the well-known canon of statutory construction that courts should construe statutes where they may fairly do so to avoid decision as to their constitutionality. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constgr. Trades Council,* 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). This contention is unavailing. As I have previously explained, "canons of construction extrinsic to the text" may not "be employed to create an ambiguity which is not inherent in the language" of the statue. *See Catholic Social Services v. Meese,* 664 F.Supp. 1378, 1382 (E.D.Cal.1987). As the Supreme Court has just reiterated,

"interpretative canon[s] [are] not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, ___ U.S. ___, ___, 109 S.Ct. 2657, 2664, 105 L.Ed.2d 512 (1989), *quoting United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed.2d 536 (1985). The FPPC's regulations cannot be given weight since the statute plainly intended to prohibit the expenditure of all carryover funds. *See PAC*, 470 U.S. at 499, 105 S.Ct. at 1469-1470.

Defendants also seek to justify the ban on expenditure of carryover funds by arguing that section 85306 assures the voters that all potentially corrupting contributions have been purged from the electoral process. On analysis, this is an argument that although the statute may not address the fact of corruption, it addresses its appearance. The boundaries of the notion of the appearance of corruption have not been fully developed. It is clear, however, that in order to insure that the First Amendment rights at stake here are given the breathing room they require, *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the scope of that evil must be narrowly defined. As the Supreme Court has taught, there must be real substance to the fear of corruption; mere suspicion, that is, "a tendency to demonstrate distrust . . . is not sufficient," no matter how widely the suspicion is shared. *PAC*, 470 U.S. at 499, 105 S.Ct. at 1470. The vague notion of purging past obligations would not appear sufficiently precise to justify the wholesale restriction on political speech mandated by the statute. Moreover, even if the statute serves to avoid the appearance of corruption, because of the "lawful purposes"

exception, it "does not provide an answer that sufficiently relates to the elimination of those dangers." *Buckley,* 424 U.S. at 45, 96 S.Ct. at 647.

Defendant FPPC also argues that to the extent section 85306 applies to independent expenditures, it can be construed as a contribution limit. So construed, section 85306 would prohibit political action committees from contributing pre-1989 funds to candidates, but would not prohibit them from spending such funds on a candidate's behalf. This construction is untenable; it contradicts the plain meaning of the statute as well as FPPC's own Regulation No. 18536.2(b). When a statute's purpose is plain, it is for the legislature, not the court, to alter it. *See Laborers' Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Company, Inc.,* 484 U.S. 539, 108 S.Ct. 830, 836, 98 L.Ed.2d 986 (1988). The ban on carryover funds as it applies to independent expenditures by political action committees is clearly unconstitutional. *Buckley,* 424 U.S. 1, 96 S.Ct. at 626; *Federal Election Commission v. Mass. Citizens for Life,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986); *PAC,* 470 U.S. 480, 105 S.Ct. at 1460.

Finally, defendant-intervenors argue that section 85306 serves the compelling state interest of providing equal opportunities to challengers and incumbents. This argument, made here under the aegis of the equal protection clause, in effect merely recharacterizes the "level playing field" argument rejected in *Buckley.* In light of *Buckley,* the defendants' argument cannot be entertained.

## IV

## INJUNCTIVE RELIEF

The relief sought by the plaintiffs takes the form of a permanent injunction prohibiting enforcement of section 85306. I have recently had occasion to examine the implications of the doctrine that not all violations of law automatically justify the awarding of injunctive relief. *See Wilderness Society v. Tyrell,* 701 F.Supp. 1473 (E.D. Cal. 1988). As I explained there, however, the consequences of that doctrine are very modest. Since considerations of public policy must weigh in determining the propriety of equitable relief, *id.* at 1479, and the Constitution is the ultimate expression of the policy of the United States, only the strangest of circumstances would suggest that a violation of the Constitution would not be subject to equitable relief. No such circumstances present themselves here.

Moreover, it is apparent that the application of conventional injunction doctrine demands the granting of the relief plaintiffs seek in this case. "The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). The Court has taught that the abridgment of First Amendment freedoms constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373-74, 96 S.Ct. 2673, 2689-90, 49 L.Ed.2d 547 (1976); *see also San Diego Committee v. Governing Bd.,* 790 F.2d 1471, 1473 n. 3 (9th Cir.1986). Because the constitutional violations demonstrated by

plaintiffs are, by their nature, irreparable, and no adequate legal redress can compensate for the loss of political expression, plaintiffs are entitled to a permanent injunction.[9]

In accordance with the above, IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment is GRANTED. California Government Code section 85306 violates the First Amendment of the United States Constitution, and its enforcement is enjoined.

IT IS SO ORDERED.

---

[9] I have repeatedly examined the Ninth Circuit's variously expressed standards for the granting of injunctive relief. *See e.g., Wilderness Society,* 701 F.Supp. at 1476-77. Given the plain propriety of granting injunctive relief once a violation of the First Amendment has been found under the circumstances of this case, no purpose would be served by rearticulating and applying those standards to the matter at bar.

## PROPOSITION 73

(California Ballot Pamphlet, June 7, 1988)

Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure amends and adds sections to the Government Code, therefore, existing sections proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new law.

Proposed Law

SECTION 1. Chapter 5, (commencing with Section 85100) is added to Title 9 of the Government Code, to read:

*CHAPTER 5. LIMITATION ON CONTRIBUTIONS*

*Article 1. Applicability and Definitions*

*85100. This chapter shall be known and cited as the "Campaign Contribution Limits Without Taxpayer Financing Amendments to the Political Reform Act."*

*85101. (a) Nothing in this chapter shall affect the validity of a campaign contribution limitation in effect on the operative date of this chapter which was enacted by a local governmental agency and imposes lower contribution limitations.*

*(b) Nothing in this chapter shall prohibit a local governmental agency from imposing lower campaign contribution limitations for candidates for elective office in its jurisdiction.*

*85102. The following terms as used in this chapter have the following meanings:*

*(a) "Fiscal year" means July 1 through June 30.*

*(b) "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and labor organization.*

*(c) "Political committee" means a committee of persons who receive contributions from two or more persons and acting in concert makes contributions to candidates.*

*(d) "Broad based political committee" means a committee of persons which has been in existence for more than six months, receives contributions from one hundred or more persons, and acting in concert makes contributions to five or more candidates.*

*(e) "Public moneys" has the same meaning as defined in Section 426 of the Penal Code.*

*85103. The provisions of Section 81012 shall apply to the amendments of this chapter.*

*85104. The provisions of this chapter shall become operative on January 1, 1989.*

*Article 2. Candidacy*

*85200. Prior to the solicitation or receipt of any contribution or loan, an individual who intends to be a candidate for an elective office shall file with the commission a statement signed under penalty of perjury of intention to be a candidate for a specific office.*

*85201. (a) Upon the filing of the statement of intention pursuant to Section 85200, the individual shall establish one campaign contribution account at an office of a financial institution located in the state.*

*(b) Upon the establishment of an account, the name of the financial institution, the specific location, and the account number shall be filed with the commission within 24 hours.*

*(c) All contributions or loans made to the candidate, to a person on behalf of the candidate, or to the candidate's controlled committee shall be deposited into the account.*

*(d) Any personal funds which will be utilized to promote the election of the candidate shall be deposited into the account prior to expenditure.*

*(e) All campaign expenditures shall be made from the account.*

*85202. (a) A candidate may only accept contributions from persons, political committees, broad based political committees, and political parties and only in the amounts specified in Article 3 (commencing with Section 85300). A candidate shall not accept contributions from any other source.*

*(b) All contributions deposited into the campaign account shall be deemed to be held in trust for expenses associated with the election of the candidate for the specific office for which the candidate has stated, pursuant to Section 85200, that he or she intends to seek or expenses associated with holding that office.*

*Article 3. Contribution Limitations*

*85300. No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office.*

*85301. (a) No person shall make, and no candidate for elective office, or campaign treasurer, shall solicit or accept any contribution or loan which would cause the total amount contributed to that candidate, including contributions or loans to all committees controlled by the candidate, to exceed one thousand dollars ($1,000) in any fiscal year.*

*(b) The provisions of this section shall not apply to a candidate's contribution of his or her personal funds to his or her campaign contribution account.*

*85302. No person shall make and no political committee, broad based political committee, or political party shall solicit or accept, any contributions or loan from a person which would cause the total amount contributed or loaned by that person to the same political committee, broad based political committee, or political party to exceed two thousand five hundred dollars ($2,500) in any fiscal year to make contributions to candidates for elective office.*

*85303. (a) No political committee shall make, and no candidate or campaign treasurer shall solicit or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee to that candidate for elective office or any committee controlled by that candidate to exceed two thousand five hundred dollars ($2,500) in any fiscal year.*

*(b) No broad based political committee or political party shall make and no candidate or campaign treasurer shall solicit*

*or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee or political party to that candidate or any committee controlled by that candidate to exceed five thousand dollars ($5,000) in any fiscal year.*

*(c) Nothing in this Chapter shall limit a person's ability to provide financial or other support to one or more political committees or broad based political committees provided the support is used for purposes other than making contributions to candidates for elective office.*

*85304. No candidate for elective office or committee controlled by that candidate or candidates for elective office shall transfer any contribution to any other candidate for elective office. Transfers of funds between candidates or their controlled committees are prohibited.*

*85305. (a) This Section shall only apply to candidates who seek elective office only during a special election or special runoff election.*

*(b) As used in this Section, the following terms have the following meanings:*

*(1) "Special election cycle" means the day on which the office becomes vacant until the day of the special election.*

*(2) "Special runoff election cycle" means the day after the special election until the day of the special runoff election.*

*(c) Notwithstanding Section 85301 or 85303 the following contribution limitations shall apply during special election cycles and special runoff election cycles.*

*(1) No person shall make, and no candidate for elective office, or campaign treasurer, shall solicit or accept any contribution or loan which would cause the total amount contributed or loaned by that person to that candidate, including contributions or loans to all committees controlled by the candidate, to exceed one thousand dollars ($1,000) during any special election cycle or special runoff election cycle.*

*(2) No political committee shall make, and no candidate or campaign treasurer shall solicit or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee to that candidate for elective office or any committees controlled by the candidate to exceed two thousand five hundred dollars ($2,500) during any special election cycle or special runoff election cycle.*

*(3) No broad based political committee or political party shall make, and no candidate or campaign treasurer shall solicit or accept, any contribution or loan which would cause the total amount contributed or loaned by that committee or political party to that candidate any committees controlled by the candidate to exceed five thousand dollars ($5,000) during any special election cycle or special runoff election cycle.*

*85306. Any person who possesses campaign funds on the effective date of this chapter may expend those funds for any lawful purpose other than to support or oppose a candidacy for elective office.*

*85307. The provisions of this article regarding loans shall apply to extensions of credit, but shall not apply to loans made to the candidate by a commercial lending institution in the lender's regular course of business on terms available to members of the general public for which the candidate is personally liable.*

*Article 4. Gifts and Honoraria*

*85400. No elected officeholder shall accept any gift or honorarium for any speech, article, or published work on a subject relating to the governmental process from any single source which is in excess of one thousand dollars ($1,000), in any calendar year, except reimbursement for actual travel expenses and reasonable subsistence in connection therewith.*

SEC. 2. Section 82041.5 of the Government Code is amended to read:

82041.5. "Mass mailing" means two hundred or more ~~identical or nearly identical~~ *substantially similar* pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter, or other inquiry.

SEC. 3. Section 89001 is amended to read:

89001. No newsletter or other mass mailing shall be sent at public expense ~~by or on behalf of any elected officer to any person residing within the jurisdiction from which the elected officer was elected, or to which he or she seeks election, after the elected officer has filed the nomination documents as defined in Section 6189 of the Elections Code for any local, state, or federal office~~.

*SEC. 4. If any provision of this act, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this act to the extent it can be given effect, or the application of those provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this act are severable.*

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No. 91-1778 (2)
No. 91-1787 (2)

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1991

FAIR POLITICAL PRACTICES COMMISSION,
QUENTIN L. KOPP AND ROSS JOHNSON,
*Petitioners,*
VS.
SERVICE EMPLOYEES INTERNATIONAL UNION, et al.,
*Respondents.*

**Petition For A Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is proof of discriminatory intent required to establish that Proposition 73's discriminatory fiscal year contribution limit scheme violates the First Amendment, where as the district court found, it gives incumbents a four to one fundraising advantage over challengers?

2. Did the circuit court err in affirming the district court's finding of fact that Proposition 73's fiscal year contribution limit scheme discriminated against challengers?

3. Is a statute that prohibits a candidate from transferring funds between the candidate's own committees an unconstitutional expenditure limit?

4. Is a statute that prohibits a candidate from transferring funds to other candidates' committees unconstitutional when the prohibition was designed to prevent circumvention of now invalidated contribution limits and when the statute forbids all transfers, not just transfers in excess of the contribution limits?

5. Is a statute that prohibits a candidate from supporting or opposing candidacies for elected office with campaign funds raised prior to January 1, 1989 an unconstitutional expenditure limit and are efforts to revive that statute now moot?

## PARTIES

Respondents agree with the lists of parties of petitioner California Fair Political Practices Commission (hereinafter "FPPC") and petitioners California State Senator Quentin Kopp and State Assemblyman Ross Johnson (hereinafter "Kopp and Johnson") except to the extent that the FPPC identified petitioners Kopp and Johnson as respondents before this Court.

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No. 91-1778
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**Petition For A Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

Respondents agree with both petitioners' explanations of the opinions below. The opinion of the Court of Appeals for the Ninth Circuit is reported at 955 F.2d 1312, and is reprinted in the Appendix to the Petition for Writ of Certiorari of FPPC (hereinafter "FPPC Pet.") at A-1 through A-36.

The opinions of the United States District Court for the Eastern District of California are reported at 721 F.Supp. 1172 and 747 F.Supp. 580, and are reprinted in the Appendix to the FPPC Petition at A-70 through A-88 and A-37 through A-69, respectively. Respondents use the page numbers in the Appendix to the FPPC Petition to cite these opinions in this brief.

## JURISDICTION

Respondents agree with the statements of jurisdiction of both petitioners except to the extent that the FPPC states that respondents appealed the district court's decisions to the United States Court of Appeals for the Ninth Circuit.

## STATUTES INVOLVED

Respondents agree with both petitioners' statements of the statutes involved.

## STATEMENT OF THE CASE

Respondents concur with the statements of the case of both petitioners except as follows. With respect to the FPPC's statement:

1. Respondents disagree with the FPPC's characterization of the litigation below regarding Proposition 73's so-called "carry-over provisions." Cal. Gov't Code § 85306. FPPC Pet. at 7-8. Although Kopp and Johnson argued to the courts below that section 85306 would assure equal opportunity to challengers, their primary argument was that section 85306 would eliminate "corruption or the appearance of corruption." FPPC Pet. at A-82 n.8. Although the district court rejected Kopp and Johnson's level playing field argument, this was not the principal reason that the court struck down the provision. *See id.* at A-82 - A-86.

2. Respondents disagree with the FPPC's characterization of the basis for the lower courts' holdings regarding Proposition 73's contribution limits. The district court held Proposition 73's fiscal year contribution limits unconstitutional because it found that they actually discriminated against challengers. FPPC Pet. at A-60. The Ninth Circuit affirmed the district court's findings. *Id.* at A-12.

3. Respondents disagree with the FPPC's characterization of the basis for the Ninth Circuit's striking down Proposition 73's prohibition on transfers of campaign funds from one candidate's campaign committees to the committees of another, the so-called "inter-candidate" transfer ban. The Ninth Circuit struck down

the ban for two reasons. First, the ban did not serve the purpose of preventing contributors from circumventing the contribution limits because the contribution limits themselves had been declared unconstitutional. Second, the ban went beyond what was needed to serve the state's interest in preventing corruption or the appearance of corruption. *Id.* at A-24.

With respect to Kopp and Johnson's statement:

1. On August 3, 1989, Kopp and Johnson asked the Ninth Circuit by motion to suspend the district court's preliminary injunction entered on May 19, 1989. On October 2, 1989, the Ninth Circuit denied the motion.

2. Justice O'Connor denied the petitioner's first request for a stay to this Court on September 29, 1990, not September 30, 1990, as Kopp and Johnson state.

3. Petitioners requested an additional stay from Justice O'Connor on October 3, 1990, following the Ninth Circuit's denial of a stay. Justice O'Connor denied the request on October 4, 1990. As Kopp and Johnson state, the full Court denied Kopp and Johnson's further stay application on October 12, 1990.

## REASONS FOR DENYING THE PETITION

Proposition 73 is a campaign finance scheme unique in American law. It limits contributions by *fiscal year* instead of by election, permitting early starters — almost always incumbents — to amass large sums of money but effectively prohibiting challengers from doing the same. The trial court found that challengers rarely surface early, and even when they do, they cannot attract financial support until close to the election when they are seen as credible candidates.

Proposition 73's fiscal year scheme would have allowed an incumbent elected to a four-year term in November 1990 to take $1,000 from a major contributor before July 1991; another $1,000 in fiscal year 1992; another $1,000 in fiscal 1993; and another $1,000 in fiscal 1994, all before the June 1994 primary. A typical challenger starting in the summer of 1993 could raise only $1,000 from a similar source. The challenger and the incumbent could

each take another $1,000 before the general election, reducing the state-mandated disparity only from 4-1 to 5-2. These are heavy odds. If Proposition 73 were like federal campaign law, such disparities would not exist.

The district court, after a full trial that produced 208 detailed findings of fact, enjoined Proposition 73's fiscal year scheme as a violation of the First and Fourteenth Amendments. On appeal, the Ninth Circuit affirmed the district court's decision.

Respondents have found no other campaign finance law in the nation like the fiscal year scheme of Proposition 73. Federal campaign law bases contribution limits on election cycles. No other state has a fiscal year scheme. And for good reason; in over three years of litigation, petitioners have been unable to assert any governmental interest that the fiscal year provisions themselves serve. *See* FPPC Pet. at A-20 n.13. Political science experts at trial offered nothing to commend this discriminatory fiscal year scheme over election cycle laws such as the federal model.

The FPPC and petitioners Kopp and Johnson ask this Court in separate petitions to review the Ninth Circuit's opinion below.[1] The dispute at the heart of this case is a factual one: did the district court properly find that Proposition 73's fiscal year contribution limit scheme discriminates against challengers? The FPPC asks this Court to embark on a third review of the record, after those of the district and circuit courts. This Court should refuse.

The FPPC's legal arguments and the arguments of Kopp and Johnson also do not warrant review. The petitions for certiorari challenge the district court's straightforward application of settled First Amendment principles to a particular set of facts. Petitioners point to no conflict between the circuits on any of the legal questions raised here. The petitions bring no untested issue to this Court. Three times petitioners have asked this Court or members of this Court to intervene by lifting the district court's injunctions.

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[1]The FPPC's petition is 91-1778. Kopp and Johnson's petition is 91-1787. Kopp and Johnson join in the FPPC's petition. Respondents oppose both petitions in this single brief.

Each time the Court has refused.[2] This Court should refuse once more.

Finally, the FPPC asks this Court to reverse and remand to the district court for reconsideration in light of Proposition 140, the initiative that instituted term limits for all California legislative and constitutional offices. The FPPC has offered nothing that undermines the district court's essential factual findings. Moreover, whatever the merits of the FPPC argument, petitioners may raise their claims before the district court, even after the judgment is final. *See* Fed. R. Civ. P. 60(b). The district court, intimately familiar with the factual record in this case, is best situated to determine whether petitioners can produce evidence that requires reversal of its judgment. Therefore, this Court should deny certiorari.

## I

## THE COURTS BELOW APPLIED THE CORRECT LEGAL STANDARD

The FPPC contends that this Court should summarily reverse the Ninth Circuit's decision because the court did not require respondents to prove intentional discrimination. FPPC Pet. at 9-10. But the cases upon which the FPPC rely demonstrate only that a showing of discriminatory intent is required when a statute is challenged on the ground that it affects a suspect class. *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 66-68 (1980); *Washington v. Davis*, 426 U.S. 229, 240-42 (1976).[3]

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[2]*See supra*. p. 3; Petition for Writ of Certiorari of Kopp and Johnson (hereinafter "Kopp Pet.") at 7-8. Petitioners also have asked the Ninth Circuit to intervene on three occasions and the district court to stay its orders twice. Each time the request was denied. *Id.*

[3] The FPPC points to the Court's use of the term "invidious discrimination" in *Buckley v. Valeo*, 424 U.S. 1, 31 (1976). Nothing in that case, however, imposes an intent requirement, nor does the term "invidious" connote intent. *Black's Law Dictionary* defines the term:

> Term "invidious" in context of claim that difference in treatment amounts to "invidious" discrimination in violation of the Four-

Proof of a First Amendment violation does not require a showing of intent. For example, earlier this term in *Simon & Schuster Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the Court invalidated a New York law that required that a criminal's income from works describing the crime be deposited into a fund to pay victims of the crime and other creditors. *Id.* at 504-05. The Court found that the law violated the First Amendment because it financially burdened speakers based on the content of their speech and was not narrowly tailored to achieve a compelling state interest. *Id.* at 508-12. In so finding, the Court did not require proof that the state intended to suppress plaintiff's speech. The Court explained:

> [O]ur cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." [Plaintiff] need adduce "no evidence of improper censorial motive." ... "[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."
>
> 112 S. Ct. at 509 (citations omitted).

*See also Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating discriminatory tax scheme on first amendment grounds without requiring a showing of intent); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (same).[4]

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> teenth Amendment, means arbitrary, irrational and not reasonably related to a legitimate purpose.
>
> *Black's Law Dictionary*, p.826 (6th ed. 1990)

This Court's use of the word in other contexts has not necessarily expressed the concept of discriminatory intent. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 (1982) (footnotes omitted) ("Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right.'").

[4]The FPPC claims that *Minneapolis Star* and the other cases the Ninth Circuit relied upon are inapposite because each reviewed a statute that was discriminatory on its face. FPPC Pet. at 10 n.3. The FPPC is

Similarly, the Court has required no such finding of intent in First and Fourteenth Amendment cases concerning fundamental rights of political speech and association. *See, e.g., Norman v. Reed*, 112 S. Ct. 698, 705-06 (1992) (invalidating election law that impinged upon the right to create and develop new political parties without requiring showing of intent); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (invalidating a statute imposing an early filing deadline for independent Presidential candidates without enquiring into intent); *Lubin v. Panish*, 415 U.S. 709, 715-18 (1974) (invalidating statute imposing mandatory filing fees for candidates to get their name on the ballot without enquiring into intent). The lower courts applied the correct legal standard.

## II

## THE COURTS BELOW PROPERLY FOUND THAT PROPOSITION 73 DISCRIMINATES AGAINST CHALLENGERS

The FPPC also asks this Court to review this case because it claims that the lower courts did not find that Proposition 73 actually discriminated against challengers. The FPPC claims that the lower courts found only that the fiscal year scheme "tends" to discriminate against challengers, that the lower courts were unable to explain how Proposition 73 discriminates against challengers, and that Proposition 73 actually benefits challengers. FPPC Pet. at 11-13.

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wrong. In cases involving discrimination against a suspect class, the violation of the Constitution lies in the fact that the government has treated a protected class differently *because* they are members of that class. In other words, the violation lies in the government's wrongful intent. However, the above-cited cases demonstrate that in cases involving a violation of First Amendment rights, the Constitution prohibits a burden on the exercise of those rights, whether intentional or not. It does not matter whether the burden on those rights is clear from the face of the statute, or merely arises from its effect. Instead, the violation lies in the simple loss of speech rights. *See Simon*, 112 S. Ct. at 509; *Arkansas Writers' Project*, 481 U.S. at 228; *Minneapolis Star*, 460 U.S. at 592.

In fact, the district court unquestionably found that Proposition 73 actually discriminated against challengers and violated the First Amendment. The district court stated:

> Proposition 73, in measuring the limitation on campaign contributions by fiscal year rather than election, unconstitutionally restricts free speech and favors incumbents against challengers, and must be found to violate the First and Fourteenth Amendments to the United States Constitution.
>
> FPPC Pet. at A-60.

After a thorough review of the record, the Ninth Circuit upheld the district court's findings:

> Thus, the testimony [at trial] provides ample evidentiary support for the district court's crucial finding that [P]roposition 73's fiscal year contribution limits discriminate against challengers as a class.
>
> *Id.* at A-12.

The district court received evidence at a six day bench trial.[5] *See id.* at A-5. In all, the court made 208 findings of fact and considered every request for findings made by the parties. See *Id.* at A-8 n.6. The Ninth Circuit exhaustively reviewed the record and the district court's findings. The findings of fact and the record clearly demonstrate that Proposition 73 discriminates against challengers.

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[5]The most compelling evidence came from two expert witnesses, Professor Gary Jacobson, the nation's pre-eminent scholar on federal campaign laws and their effect on challengers, and Professor Bruce Cain, the pre-eminent scholar on California political life. Professor Jacobson's testimony was based on his study of campaign finance and the fundraising patterns of incumbents and challengers in congressional elections. Professor Cain's testimony was based on his study of the area of campaign finance in general, and in particular on Plaintiffs' Trial Exhibit 6, a study of contribution patterns in recent California legislative and statewide races. FPPC Pet. at A-11.

The district court found that incumbents usually begin races with significant fundraising advantages over challengers.[6] Incumbents raise large amounts of money early and steadily.[7] Challengers do not.[8] Challengers depend on raising substantial sums of money just before an election.[9]

Proposition 73 grossly exacerbates the advantages of incumbency. For example, under Proposition 73, an incumbent candidate for a four-year office who started amassing funds immediately after his or her last election to the State Senate could return to each contributor five times before the next election.[10] However, Proposition 73 allows challengers at most two fiscal year periods to raise money.[11] The result is at least a five to two state-mandated fundraising advantage for incumbents.

The FPPC's argument that Proposition 73 actually benefits challengers makes no sense in this light. Even if Proposition 73 takes more money from incumbents than challengers in raw dollar

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[6]Finding of Fact Nos. 118, 132, 133 FPPC Pet. at A-107, A-110.

[7]Findings of Fact Nos. 80, 127, 128, 132, FPPC Pet. at A-101, A-109, A-110.

[8]Findings of Fact Nos. 74, 79, 129, 130, 133, 139, FPPC Pet. at A-101, A-109, A-110, A-111. The vast majority of challengers do not raise money in non-election years. Plaintiffs' Trial Exhibit 6, Appellees' Joint Supplemental Excerpts of Record (hereinafter "Appellees' Supp. Rec."), Tab B at 5-6. The keys to a challenger's success, such as an incumbent's vulnerability, are usually not evident until relatively close to an election. Findings of Fact No. 129, FPPC Pet. at A-109.

[9]This means that challengers must obtain large contributions from individual contributors, PACs, and other, more established candidates. Findings of Fact Nos. 107, 127, 139, 140, FPPC Pet. at A-106, A-109, A-111.

[10] Reporter's Transcript (hereinafter "RT") at 419-20. This translates into $5,000 from each individual contributor, $12,500 from each small PAC, and $25,000 from each broad-based PAC.

[11] RT at 418-19. As a result, the challenger could receive at most $2,000 from each individual contributor, $5,000 from each small PAC, and $10,000 from each broad-based PAC.

terms, it creates an overwhelming disadvantage for challengers at a critical level of fundraising. Proposition 73 deprives challengers of highly valuable funds but takes only excess funds of relatively low marginal value from incumbents.[12] Furthermore, the record contains ample evidence to conclude that Proposition 73 would take more from challengers than incumbents in raw dollars terms in races where it counts. The district court found that in competitive races, challengers, not incumbents, benefited more from contributions in excess of Proposition 73's limits.[13]

The trial court's factual findings are, of course, entitled to deference, and will be set aside by a reviewing court only if "clearly erroneous." Fed. R. Civ. P. 52(a); *see, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). The Ninth Circuit upheld the district court's findings after thorough review. *See* FPPC Pet. at A-8 - A-13. This Court should not review the findings again. *See, e.g., Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (this Court "rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

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[12] *See* Findings of Fact Nos. 125-26, FPPC Pet. at A-109.

[13] Finding of Fact No. 140, FPPC Pet. at A-111. This finding was based on Plaintiffs' Trial Exhibit 17. Appellees' Supp. Rec., Tab D (hereinafter "Exh. 17"). In preparing Exhibit 17, Professor Cain culled all competitive races for the California Legislature in 1988, before Proposition 73 took effect. RT at 426. He examined the funds collected by both challengers and incumbents to determine when the funds were collected, whether they were transfers from other candidates or contributions, and how much candidates received from contributions that would have exceeded Proposition 73's limits. RT at 424-26, 435-36. Professor Cain found that, in six of the eight competitive races studied, it was challengers — not incumbents — who benefitted more from contributions in excess of Proposition 73 limits. RT at 432-36, 442; Exh. 17, Table I. And the vast majority of the excess contributions challengers received came after the primary election. Exh. 17, Table I. Very few of those challengers raised more than a negligible amount of funds prior to the primary. *Id.*

## III

## THE LOWER COURTS' INVALIDATION OF PROPOSITION 73'S PROHIBITIONS ON THE USE OF CAMPAIGN FUNDS PROVIDES NO BASIS FOR CERTIORARI

In addition to its core fiscal year contribution limits, Proposition 73 contained three separate prohibitions on the use to which campaign funds could be put. It prohibited transfers of funds between separate campaign committees of a candidate, for example, between that candidate's State Assembly committee and his or her committee for statewide office. It prohibited transfers of funds from one candidate to another or between ballot measure committees and candidates. And it prohibited altogether the use of campaign funds raised before the effective date of Proposition 73 for the very political purposes for which the money had been raised, waging a campaign for elective office.

The courts below properly struck down these bans.

### A. Intra-Candidate Transfer Ban

Proposition 73 prohibits so-called "intra-candidate" transfers, transfers of campaign funds between a candidate's own campaign committees.[14] Petitioner asks this Court to grant review of this case to resolve what it terms the "important question" of whether such a transfer ban is an "expenditure" limitation. FPPC Pet. at 20-21.

The intra-candidate transfer ban is clearly an expenditure limit. Put simply, it prevents a candidate from spending lawfully raised money to enhance the candidate's prospects for winning an election. The FPPC devoted so little attention to the issue in its briefing before the Ninth Circuit that the appellate court did not even understand that the FPPC contended that the intra-candidate transfer ban was not an expenditure limitation. *See* FPPC Pet. at A-22 n.17 ("Appellants do not appear to dispute that the intra-candidate transfer ban operates as an expenditure limitation.").

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[14]Cal. Gov't Code §§ 85200, 85201, 85202(b), 85304.

Petitioners Kopp and Johnson complain that the Ninth Circuit failed to recognize a state interest in "assuring campaign contributors that funds contributed would not be raised for one office and spent for another" to justify the ban. Kopp Pet. at 23. The Ninth Circuit, however, found that even if the interest were compelling, the intra-candidate transfer ban was not narrowly tailored to achieve this purpose. FPPC Pet. at A-23. The Ninth Circuit held that the interest "could be [served] simply by requiring candidates to inform contributors that their contributions might be spent on other races." *Id.* at A-23.[15]

Petitioner has pointed to no conflict in the federal circuits or the states regarding whether intra-candidate transfer bans are expenditure limits. Indeed, federal law contains no intra-candidate transfer bans.[16]

**B. Inter-Candidate Transfer Ban**

Proposition 73 also prohibits so-called "inter-candidate" transfers — transfers of campaign funds from one candidate's campaign committees to the committees of another.[17] The FPPC asks this Court to determine whether such a ban is narrowly tailored to serve the compelling state interest of preventing corruption or the appearance of corruption.

The FPPC argued before the Ninth Circuit that the inter-candidate transfer ban was necessary to prevent contributors from circumventing the contribution limits. FPPC Pet. at A-24. The Ninth Circuit upheld the district court's invalidation of the

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[15]*See also id.* (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 261 (1986)) ("Concerns about the unintended use of contributors' money can be met 'by means far more narrowly tailored and less burdensome than [a] restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.' ").

[16]Federal campaign law permits a candidate to transfer funds from a campaign fund for one office to another and to carry over funds from one election to another. RT 312, 348.

[17]Cal. Gov't Code § 85304.

transfer ban because the ban could not serve this purpose given that the contribution limits based on the fiscal year structure were unconstitutional. *Id.*

The FPPC now contends that the inter-candidate transfer ban is narrowly drawn to further the State's interest in preventing corruption or the appearance of corruption arising from large contributions made by the leadership of the state legislature. Kopp and Johnson made essentially the same argument before the Ninth Circuit. The Ninth Circuit rejected the argument because Proposition 73's inter-candidate transfer ban flatly prohibits all transfers, whether large or small. FPPC Pet. at A-24 - A-25. The ban plainly goes far beyond what is needed to address the potential for corruption that derives only from large contributions, not small ones. *Id.* The FPPC offers no reason why the Ninth Circuit's reasoning is infirm.[18]

This issue does not warrant review. Petitioner has pointed to no conflict in the circuit courts on the matter. Indeed, federal law contains no such inter-candidate transfer ban.[19]

### C. The Carryover Ban

Finally, petitioners Kopp and Johnson ask this court to grant certiorari to review the lower courts' invalidation of Proposition 73's so-called "carryover ban." Proposition 73 prohibited candidates from spending funds raised prior to January 1, 1989 to

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[18]Kopp and Johnson also attempt to justify the inter-candidate transfer ban on the grounds that it prevents "last minute transfers" of money that have affected electoral outcomes. Kopp Pet. at 24. They argue that the ban promotes "challenger participation in the political marketplace." *Id.* However, as explained above, *see supra* at p. 9, these large transfers are vital for challengers to be able to compete against incumbents. *See also* Finding of Fact No. 141, FPPC Pet. at A-111. Moreover, this is the level playing field argument, soundly rejected by the Court in *Buckley*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

[19]Federal campaign law permits a candidate to form a PAC and contribute subject to the limits imposed on other PACs. RT 311.

support or oppose a candidacy for elected office. Cal. Gov't Code § 85306. The prohibition applied whether or not funds were raised within limits imposed by Proposition 73. The Ninth Circuit correctly held that the ban served no compelling purpose given that Proposition 73's contribution limits were invalid. *See* FPPC Pet. at A-25.

Moreover, the issue is almost certainly moot. Since the carryover ban was enjoined on September 14, 1989, California has held three statewide elections, and cities, counties, school districts, and other local entities have held numerous other elections. It is virtually certain that no funds raised before January 1, 1989 remain in candidates' accounts.

The constitutionality of Proposition 73's carryover ban is certainly not an issue that warrants review. The FPPC did not even appeal the district court's invalidation of the carryover ban to the Ninth Circuit. FPPC Pet. at A-25. The federal system has no such carryover ban. Petitioner has identified, and we are aware of, no other state that has such a ban. Petitioner has cited no conflict in the federal circuits or the states that this Court should resolve.

## IV

## THE CHANGES CAUSED BY PROPOSITION 140 DO NOT WARRANT CERTIORARI

Finally, the FPPC asks this Court to grant certiorari, reverse the judgment below and remand to the district court for further consideration in light of Proposition 140. The FPPC asserts that Proposition 140, the initiative that limited the number of terms a person may serve in a California legislative or constitutional office, so altered the political landscape of California that "the relationship between fundraising and challenges to an incumbent officeholder" is now "a matter of pure conjecture." FPPC Pet. at 14.[20]

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[20]As the FPPC states, this Court denied certiorari on the state court challenge to Proposition 140 on March 9, 1992, after the Ninth Circuit decided petitioner's appeal in this case. FPPC Pet. at 14; *see Legislature v. Eu*, 54 Cal.3d 492 (1991), *cert. denied* 112 S. Ct. 1292 (1992).

This Court should deny the FPPC's request. Nothing the FPPC offers undermines the lower courts' central conclusion that Proposition 73's fiscal year contribution limit scheme unconstitutionally discriminates against challengers. Even under Proposition 140, many well-funded incumbent officeholders will seek re-election, and many under-funded challengers, dependent upon obtaining large amounts of money late in the race, will try to unseat them. In many cases, Proposition 73 would work the same discrimination against challengers because it would still permit incumbents to raise sufficient money to finance their campaigns but deny challengers an equal opportunity to reach the threshold they need.

The FPPC offers only conjecture about the effect of Proposition 140 on Proposition 73's fiscal year contribution limit scheme. This speculation does not provide the basis for reversing the lower courts' decisions, made after exhaustive argument, consideration, and review.[21] The issues petitioner raises are complex factual matters. For example, determining the effect of Proposition 140 on the discrimination Proposition 73 works against challengers would require complex statistical data and expert opinion regarding political fundraising. A court would need to determine such matters as threshold amounts of money challengers need to mount viable campaigns, the effect of Proposition 140 on the power of incumbency, and the fundraising needs and capabilities of challengers and incumbents.

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[21]Indeed the cases upon which the FPPC relies do not support granting certiorari where petitioner offers mere speculation regarding the effect of an intervening state law on the factual record upon which the lower courts based their holdings. In *Omaha Nat'l. Bank v. Nebraskans Indep. Banking*, 426 U.S. 310 (1976), the Court reversed and remanded the case in light of intervening state legislation that redefined a term that was key to the lower court's holding. *Id.* at 310-11. Unlike here, the case involved a clear change in state law that appeared to have straightforward implications for the decision for which certiorari was sought. In *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981), the Court without explanation vacated and remanded the case in light of the Economic Recovery Tax Act of 1981. Nothing in the order suggested that changed factual circumstances served as the basis for the decision.

Whether the FPPC can produce evidence that justifies reversal or modification of the district court's decision is a factual determination that the district court, not this Court, should make in the first instance. The district court is intimately familiar with the factual record of this case after conducting the six day trial and reviewing the record to make its 208 factual findings.

The Federal Rules of Civil Procedure permit the FPPC to pursue this matter in the district court, even after final judgment, through a motion for relief from the judgment under Rule 60(b). Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [if] (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justif[ies] relief from the operation of the judgment.
>
> Fed. R. Civ. P. 60(b).[22]

The district court may modify or revoke a final, permanent injunction when a "significant change in circumstances warrants revision . . . ." *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 760 (1992); *see also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437, 440 (1976); *System Fed'n No. 91, Railway Employees' Dep't v. Wright*, 364 U.S. 642, 646-48 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). This Court has observed that the district court "is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co. of California v. United States*, 429 U.S. 17, 19 (1976) (quoting *Wilkin v. Sunbeam Corp.*, 405 F.2d 165, 166 (10th Cir. 1968)). In *Standard Oil*, this Court held that a district court may entertain a Rule 60(b) motion without this Court's leave. *Id.* at 17. Indeed, "the place to make a record is the district court and not the appellate court." *Wilkin*, 405 F.2d at 166.

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[22]The motion must be made "within a reasonable time" and "does not affect the finality of a judgment or suspend its operation." Fed. R. Civ. P. 60(b).

If the FPPC feels a Rule 60(b) motion is appropriate, it can make that motion. There is no need for this Court to grant certiorari and remand.

## CONCLUSION

The petitions for certiorari should be denied.

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Respectfully submitted,

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